IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1951

Nos. 186 and 187

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,
v.
ROANE-ANDERSON COMPANY.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,
v.
CARBIDE AND CARBON CHEMICAL CORPORATION.

BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

SMITH TROY,
Attorney General of Washington

C. JOHN NEWLANDS,
Assistant Attorney General of Washington

Attorneys for the State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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MOTION FOR LEAVE TO FILE BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

Smith Troy, Attorney General of the State of Washington, and C. John Newlands, Assistant Attorney General of the State of Washington, move this Court that leave be granted to file Brief of the State of Washington Amicus Curiae in the above entitled causes, pursuant to rule 27, paragraph 9, of the Supreme Court of the United States.

SMITH TROY,
Attorney General of Washington

C. JOHN NEWLANDS,
Assistant Attorney General of Washington

Attorneys for the State of Washington, Amicus Curiae.

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BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The State of Washington, by its Attorney General and pursuant to Rule 27, paragraph 9, of this Court, files this brief in support of the petitioner in the above entitled actions.

INTEREST OF AMICUS CURIAE

The State of Washington imposes a "business and occupation tax" upon all persons doing business in Washington for the privilege of engaging in business in the State. Such tax is imposed upon those persons making retail sales at the rate of 1/4 of 1% of the gross proceeds of their retail sales. Title II, Chap. 180, Washington Laws of 1935, as amended.

The General Electric Company, through a contract with the United States Government, supervised by the Atomic Energy Commission, manages and operates the Hanford Works, which is a huge installation in the State of Washington for the production of plutonium and for possible other operations in the atomic energy field. The tangible personal property sold, furnished, or consumed and the services rendered in the performance of such contract constitute a "retail sale," as that term is defined in the above statute.

The State of Washington is now engaged in litigation with the General Electric Company to determine whether that private corporation is subject to payment of the Business and Occupation Tax measured by its gross receipts from the United States for such retail sales in the management and operation of the Hanford Works. This case is now on appeal in the Supreme Court of the State of Washington (*General Electric Company v. State of Washington*, Docket No. 31962).

The questions involved in the instant actions are substantially the same as are involved in the case of *General Electric Co. v. State of Washington*: both the respondents and General Electric Company operate under a contract with the United States Government under

supervision of the Atomic Energy Commission; the question is whether a State in which such a contract is performed may tax the contractor measured by its receipts thereunder; the effect of section 9 (b) of the Atomic Energy Act of 1946 upon such state taxation is involved.

The issues are not identical because the instant cases involve sales and use taxes, taxes upon a vendor who sells to a federal contractor or upon the contractor for the privilege of using personal property the sale of which was not subjected to the sales tax; the *General Electric* case involves a tax on the federal contractor itself for the privilege of engaging in business activities in the State measured by its gross receipts from the performance of the contract. The differences are the same in incidence of a tax as were involved on one hand in *James v. Dravo Contracting Co.*, 302 U. S. 134 (involving a gross receipts business tax on a federal contractor), and on the other hand in *Alabama v. King & Boozer*, 314 U. S. 1 (involving sales tax on a vendor for sales to a federal contractor for use in performance of the contract), and *Curry v. United States*, 314 U. S. 14 (involving a use tax on the federal contractor for materials used in the performance of the contract).

Any decision by this Court in the present action will quite certainly influence, and perhaps control, the decision of the Supreme Court of Washington in the case now before it.

STATEMENT OF THE CASE

The State of Washington adopts the statement of the case as made in the brief of petitioner.

STATEMENT OF THE QUESTIONS INVOLVED

The State of Washington, in stating the questions involved, will not pinpoint the issues to the particular state tax involved because its interest, as stated above, concerns a tax having a slightly different legal incidence. As more broadly stated below the questions are the same as are involved in its litigation with General Electric Company. Such questions are:

I. Whether section 9 (b) of the Atomic Energy Act of 1946 *by its terms* exempts an independent contractor with the United States operating under the direction of the Atomic Energy Commission from state excise taxation in its management and operation of an atomic energy installation.

II. Whether Congress has the power to exempt an independent contractor with the United States from nondiscriminatory, nonexcessive state taxation in the performance of such a contract.

ARGUMENT AND CITATION OF AUTHORITIES

It was held in the court below—and it cannot be seriously contested—that respondents are independent contractors with the United States Government operating under a cost-plus-fixed-fee contract. Such was the ruling of both the trial and appellate courts of the State of Tennessee. It follows, and so held the Supreme Court of Tennessee, that the issues in this case are controlled by *Alabama v. King & Boozer*, 314 U. S. 1, and *Curry v. United States*, 314 U. S. 14, unless section 9 (b) of the Atomic Energy Act operates to exempt such independent contractors from state taxation with respect to such activities. It is the position of the State of Washington that section 9 (b) does not exempt respondents herein from state excise taxes.

It is the position of the State of Washington that section 9 (b), *by its own terms*, is not adequate to indicate a desire on the part of Congress to grant exemption from state taxation of those contractors which manage and operate atomic energy installations under contract with the Federal Government; such position will be stated in Section I of this argument. It is the further position of the State of Washington that Congress has no authority to exempt such independent contractors from nondiscriminatory, nonexcessive state taxation with respect to the performance of contracts with the Federal Government; such position will be stated in section II of this argument.

I. Section 9 (b) of the Atomic Energy Act of 1946 does not by its terms operate to exempt an independent contractor with the United States operating under the supervision of the Atomic Energy Commission in the management and operation of an atomic energy installation from state taxation with respect to such activities.

Section 9 of the Atomic Energy Act is entitled "Property of the Commission." A reading of the entire section is essential to an understanding of the last sentence, upon which reliance is placed by respondent for its claim of tax exemption. Subdivision (a) of that section deals with the transfer of all property interests theretofore accumulated for the production of fissionable material, atomic weapons, etc., to the Atomic Energy Commission. Subdivision (b) provides for the making of lieu payments to the various States and localities in which activities of AEC are carried on in substitution for taxation of the property so transferred to AEC. Having provided for payments in lieu of taxes upon its property, Congress then expressly exempted AEC from taxation by any State or subdivision thereof of its "property," "income," or "activities."

Concerning the contents of section 9, the congressional committee reported as follows:

> "The Commission is to take over all the resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property." Report of Special Committee on Atomic Energy, Report No. 1211, 79th Congress, 2d Session.

This report supports the interpretation that section 9 pertains only to the property to be owned by the Com-

mission, and to lieu payments to state and local government for the loss of property taxes.

The only basis upon which state tax exemption can be found in section 9 is in a broad, and unwarranted, interpretation of the word "activities" as used in that section. The act exempts from taxation "property," "income," and "activities" of the commission. Certainly we are not here involved with either property taxation or income taxation. We *are* involved with excise taxation upon what might be considered activities of respondents, as federal contractors. Are the activities of such contractors "activities" of AEC?

If Congress were granting exemption from state taxation to federal contractors, Congress would have been doing so for the first time in history. Never before (to the knowledge of amicus curiae) has Congress even attempted by statute to grant exemption from state taxation to mere contractors with the Federal Government. Congress well knew this, for the issue of granting such exemption had several times before been before it, and had been rejected. Congress having the above in mind, it is submitted that it would not have been so obtuse as to use the indefinite words "activities * * * of the Commission" to exempt *contractors* with AEC from state taxes.

Where Congress has granted tax exemption (in a field where it has such power for the protection of its own instrumentalities such as Home Owner's Loan Corporation, Reconstruction Finance Corporation, and Federal Land Banks) its language has never been vague or ambiguous. Congress knew in 1946 when considering the Atomic Energy Act that development of atomic energy

installations, the operation thereof, and the production at such installations as Oak Ridge and Hanford were being taxed by the States in which such installations were located. Reference to the record of the proceedings of the congressional committee considering the Atomic Energy Act will evidence this. In view of this knowledge, had Congress desired to eliminate such state taxation, would it have been vague and ambiguous in its selection of words to achieve this purpose? It would have been simple draftsmanship to attempt to exempt the independent contractors with AEC. The failure to take this obvious and simple step can only indicate an intent to grant exemption to the Atomic Energy Commission only.

Congress had referred to the use of contractors by AEC in its performance of its functions (as was the practice under Army control), referring expressly to "contracts" and the use of "contractors" in sections 3 (a), 4 (c), and 10 (b) (5) (A). Even assuming an agency rather than independent contractual relationship, it is most significant that within section 9 (b) itself (the second sentence) Congress referred both to the "activities" of AEC and to the "activities" of the agents of AEC; but in the fourth sentence (which relates to tax exemptions), Congress referred only to the "activities" of AEC, and not to those of its agents. Such express inclusion of agents in one regard in one sentence of a section and exclusion in a closely following sentence in another regard can only indicate an intent that the application of the latter sentence be not so broad as the former. If the word "activities" in the second sentence does not include operations of the Commission through its agents, or even independent contractors, necessitating the reference to its "agents," then the same word "activities" in the fourth

sentence should be construed no more broadly. The word cannot have two different meanings in the same section. Thus, activities of the Commission cannot include activities of the agents of the Commission, and much less, independent contractors with the Commission.

Two arguments are used by opponents of State taxation for the expansion of the word "activities" to include a tax exemption for contractors with AEC. It is first argued that AEC, as an agency of the United States, is already tax exempt; therefore statutory exemption is unnecessary and Congress would not do a useless act. While statutory exemption may have been unnecessary, nevertheless Congress has seen fit in other cases (e.g., HOLC, RFC, and Federal Land Banks) to express such exemption by statute. We might again point out that when Congress did expressly grant exemption, its meaning was clear and its language explicit.

The second argument asks what the word "activities" means if it does not refer to the operations of the AEC through contractors. We submit that the inclusion of the word "activities" was intended to cover excise taxation which could have had its incidence upon the various activities of AEC such as sales, purchases, use of property, and manufacturing. The last sentence of section 9 (b) eliminates state taxation of the "property" of the Commission, the "income" of the Commission, and the "activities" of the Commission. This effectively eliminates the three types of taxation which might be expected. It may be well again to point out that earlier in section 9 (b), when using the word "activities," Congress did not hesitate to speak of "activities of the Commission, the Manhattan Engineer District or their agents," while in

the fourth sentence Congress spoke only of "activities * * * of the Commission."

Further, if "activities" of AEC include the performance of its functions through contractors, a prime contractor with AEC is no more entitled to tax exemption than a subcontractor, a sub-subcontractor, or any vendor supplying property or services which are intended to be and are eventually utilized in the production of atomic energy under the supervision of AEC. There is no logic which will support an interpretation of the word "activities" to include not only AEC but also a contractor with AEC, but still delimit it to prime contractors with AEC. It would only be a matter of degree, and some subcontractors could be closer in degree to AEC than some prime contractors. A performance of work by a subcontractor or any supplier would be as much the "activity" of AEC as is such performance by a prime contractor with AEC.

We respectfully submit that section 9 (b) does not by its own terms grant exemption to respondents herein from state taxation in the performance of their contracts with the United States Government under the supervision and control of the Atomic Energy Commission.

II. Congress does not have power to exempt an independent contractor with the United States from nondiscriminatory, nonexcessive state taxation in the performance of a contract with the United States.

While this Court has several times referred to the failure of Congress to grant exemption to contractors with the Federal Government as supporting an argument that no such exemption existed under the doctrine of implied intergovernmental immunities, this Court has never decided that Congress *does* have delegated power under the Constitution of the United States to grant such exemption. Certainly Congress has not been expressly delegated with power to grant such exemption, and any such authority depends solely upon finding that such exemption is necessary and proper for carrying into execution the expressly delegated powers. U. S. Const. Art. 1, § 8, cl. 18. It is submitted that the granting of such tax exemption by Congress is not necessary and proper to the carrying out of functions delegated to the Federal Government.

In the instant case we are not dealing with a tax upon the Government of the United States nor upon its property. *James v. Dravo Contracting Co.*, 302 U. S. 134. Compare: *Mayo v. United States*, 319 U. S. 441; *United States v. Allegheny County*, 322 U. S. 174. We are not dealing with a tax upon an instrumentality of the Federal Government; respondents are independent contractors. *James v. Dravo Contracting Co.*, 302 U. S. 134; cf., *McCulloch v. Maryland*, 4 Wheat. 316. The tax involved is nondiscriminatory and nonexcessive; it is no more than that borne by all others engaged in business in the taxing State. We are not concerned with a tax upon a government contract. The tax is an excise tax, a tax upon

business for the privilege of engaging in business. *Hooten v. Carson*, 186 Tenn. 282.

If we were concerned with a tax upon an instrumentality of the Federal Government, there is no question but that Congress could immunize its activities within its power to protect that which it may create. Decisions of this Court have protected and accepted statutes of Congress declaring that immunity should be granted to agencies created by Congress. In *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, this Court held that because the creation of HOLC was within the powers of Congress, the granting of exemption from state taxation was within its powers to protect such a federal instrumentality. In *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, this Court referred to the fact that the federal land banks were created under the Federal Farm Loan Act, and that as such they were instrumentalities of the Federal Government. Having so found, this Court honored as within Congress' powers an express statutory declaration that the banks should not be taxed with respect to their activities. In *Maricopa County v. Valley National Bank*, 318 U. S. 357, the Court was faced with a statute in which Congress declared that States should not tax the Reconstruction Finance Corporation except in certain particulars set forth therein. After finding that RFC was a federal instrumentality, this Court said that Congress has the power to determine the extent to which its instrumentalities may be taxed, and thus could restrict or even prevent state taxation.

But we are not here involved with a federal instrumentality. We are dealing with a mere contractor with the Federal Government, one which contracted with the United States through the United States Army, and which

contract has now been placed under the supervision of the Atomic Energy Commission. State excise taxation of such contractors in the field of business taxes, sales taxes, and use taxes, has been upheld by this Court. *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Tax Commission*, 302 U. S. 186; *Alabama v. King & Boozer*, 314 U. S. 1; *Curry v. United States*, 314 U. S. 14. In those cases, as well as in numerous others decided by this Court, it was held that the mere "economic burden" of such a tax as it was passed on as a cost to the Federal Government was not sufficient to invalidate the same.

In the foregoing, as well as in other cases to be cited below, this Court has had occasion to declare that the particular state tax before it was valid in the absence of action by Congress. However, this Court has never held that Congress *does* have the power to exempt such independent contractors from state taxation with respect to the performance of a contract with the Federal Government. In such cases, this Court has often stated that it was not faced with the problem of determining whether such power existed. It often referred to the absence of congressional action, using that as support for a decision upholding a state tax; but such argument can in no manner be interpreted as a holding that Congress had such power.

In *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, this Court upheld the power of states to tax the income of employees of HOLC, but said:

> "Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity

> of federal agencies which courts have implied, is a question which need not now be determined."

In *Alabama v. King & Boozer*, 314 U. S. 1, adopted by the opinion in *Curry v. United States*, 314 U. S. 14, this Court stated:

> "Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of government projects. Consequently, the participants in the present taxation can enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the National Government."

In *Oklahoma Tax Commission v. The Texas Company*, 336 U. S. 342, this Court held that lessees of Indian lands could be subjected to state excise taxation, but said:

> "We do not imply, by this decision, that Congress does not have power to immunize these lessees from taxes we think the Constitution permits Oklahoma to impose in the absence of such action. The question whether immunity shall be extended in situations like these is essentially legislative in character."

However, the last quoted passage of the opinion must be read in the light of the prior finding of the Court that lessees of Indian lands might be regarded as federal instrumentalities, performing functions within federal powers and policy in the conduct of Indian affairs.

So, if this Court finds section 9 (b) of the Atomic Energy Act is adequate in language to confer tax exemption upon independent contractors with the Federal Government, it is faced for the first time squarely with the issue of whether Congress has the power to grant such

immunity. We submit that Congress does not have such power.

If Congress has such power it is only because it is "necessary and proper" to the carrying out of one of its expressly delegated functions. There is no showing that exemption of the sort of normal and expected State tax here involved is either necessary or proper. The only showing is that such a tax may be passed on to the Federal Government as a cost, so that the "economic burden" of the tax is on the United States. Nothing else is shown to support a finding of necessity or propriety for the exercise of such power.

But this Court has held on numerous occasions that the mere economic incidence of a state tax on the Federal Government is not sufficient to strike down a state tax on a federal independent contractor based upon an implication of immunity. On the other hand, this Court has recognized its position as a tribunal charged with the duty to protect the delegated powers of the Federal Government in their performance, even where Congress has not forbidden a tax, where the situation indicates a burden on the Government. It does not hold that the mere economic incidence of a nondiscriminatory, nonexcessive state tax is a burden.

How then can Congress find that such a nondiscriminatory, nonexcessive tax, such as that of Tennessee, is such a burden that its elimination is necessary and proper? The tax is no worse in its effect with a statute on the books which outlaws it. Is its elimination "necessary and proper"?

If it is not such a burden on the Government sufficient to raise an implied immunity, is it such a burden as

to be within Congress' power to do that which is necessary and proper to the exercise of the admitted power of the United States to enter contracts for atomic energy production and development? We submit that it is not such a burden, and that Congress has no power to invalidate such a nondiscriminatory state tax. As this Court said in *Alabama v. King & Boozer*, 314 U. S. 1:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity."

Congress cannot lift itself by its own bootstraps, giving itself powers by its declaration through legislation. It follows that the fact that Congress may choose to legislate on a subject is not relevant in the determination if it has power to so legislate. The only question is whether it could have so legislated in any event.

If state taxes are to be expected as an economic burden of the United States in the conduct of its affairs, as are federal taxes an economic burden on the States, and if a state tax be nondiscriminatory and not excessive in amount, it is submitted that there is no ground upon which it may be found that the granting of tax exemption is necessary and proper to the carrying into execution of powers vested in Congress.

A decision by this Court that Congress has power to grant tax exemption to independent contractors with the Federal Government would have a tremendous and tragic effect upon the powers of state government. If Congress

has the power to exempt from normal state taxation any more than the Federal Government, or the agencies and instrumentalities created by it to exercise federal powers, if Congress can go beyond the "person" of the Government to the activities of others with the Government and exempt such other persons from taxation with respect to those activities merely because of the economic effect of the normally expected state taxes on the Federal Government, it is submitted that Congress would have a stranglehold on the very life of the state governments.

Although taxes may not be a legal obligation of a consumer, and may strike a manufacturer or vendor or other business person or function, it is an accepted economic fact that taxes are "passed on" to successive purchasers, and are ultimately borne by the consumer. The "economic burden" is on the consumer. Thus, the United States Government as a consumer bears the economic burden of a portion of all taxes—federal, state, and local—which are at various stages of production and sale imposed upon the products and the business concerns handling products ultimately consumed by the Government.

If the basis of congressional power to grant tax exemption is the economic burden on the Government in the exercise of its delegated powers, and if we are not concerned with a discriminatory tax or an excessive tax but are concerned only with an expected, normal state tax on a private individual, Congress can have no power under the "necessary and proper clause" to grant exemption. If Congress has such power, by the nature of the power being based on the economic incidence on the United States, Congress is not restricted to tax immunization of those doing business directly with the Government. The

burden is just as great, and probably many times greater, with respect to the taxes imposed upon those subcontractors, sub-subcontractors, vendors of supplies and materials, manufacturers, extractors, etc., having their place earlier in the economic process. Thus, Congress could reach any person and prevent his being taxed with respect to any activity or product traceable ultimately to the Federal Government. The separation of such taxes would be a practical impossibility.

These are the logical results of finding that Congress has the power to prevent normal and expected state taxation of independent contractors with the United States Government. The Court's attention is directed to the near-absolute power such a decision would give Congress over the revenue-raising ability of the States; the logical extension of this is that Congress would have such a stranglehold on the economy of the States as to amount to control over their existence as the independent sovereignties intended in the Constitution.

Nor is the argument that the power to tax is the power to destroy of any avail. This Court has repudiated that doctrine before. If the tax be excessive or discriminatory, this Court would then find the tax to be such a burden as to be within the field of implied immunities. *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, and cases cited. And if the tax be of such nature, we do not challenge the power of Congress to immunize independent contractors from such improper taxation. This would be well within Congress' power to protect performance of functions of the United States Government from interference. *James v. Dravo Contracting Co.*, 302 U. S. 134.

CONCLUSION

Because we believe that the Supreme Court of Tennessee has incorrectly interpreted section 9 (b) of the Atomic Energy Act of 1946, and because we believe that Congress has no power to immunize mere federal contractors from state taxation of the type here involved, the State of Washington, as amicus curiae, submits that the judgment below should be reversed.

Respectfully submitted,

SMITH TROY,
Attorney General of Washington

C. JOHN NEWLANDS,
Assistant Attorney General of Washington

Attorneys for the State of Washington.

Temple of Justice, Olympia, Washington